

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION

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HUBEL, United States Magistrate Judge:

1 expressly limits the time frame of the alleged conduct to the  
2 period "[f]rom August 28, 2012, through September 8, 2012." *Id.*

3 The code section Oberdorfer allegedly violated prohibits:

4 Constructing, placing, or maintaining any kind  
5 of road, trail, structure, fence, enclosure,  
6 communication equipment, significant surface  
7 disturbance, or other improvement on National  
8 Forest System lands or facilities without a  
9 special-use authorization, contract, or  
approved operating plan when such authoriza-  
tion is required.

9 36 C.F.R. § 261.10(a).

10 The case came on for trial before the undersigned on Friday,  
11 March 8, 2013. At that time, Oberdorfer made an oral motion to  
12 dismiss the case on double jeopardy grounds. The court continued  
13 the trial, and directed the parties to brief the double jeopardy  
14 issue. The parties have done so, see Dkt. ## 30, 32, 33, 34 & 35,  
15 and the court heard oral argument on the motion on April 19, 2013.  
16 Having considered the parties arguments and authorities, I now **deny**  
17 Oberdorfer's motion to dismiss for the reasons discussed below.

### 18 **DISCUSSION**

19  
20 There has been substantial civil litigation between the  
21 Government and Oberdorfer's company, Western Radio Services, Inc.  
22 ("WRS"), for several years, all relating to WRS's activities. WRS  
23 has communications leases with the National Forest Service for the  
24 operation of numerous communications towers on National Forest  
25 System lands. These facilities include a communications tower on  
26 Walker Mountain in the Deschutes National Forest. In the fall of  
27 2010, WRS constructed a second tower and made other modifications  
28 to its facilities at the Walker Mountain site. Those activities

1 led the Government to file a civil action against WRS, claiming,  
2 *inter alia*, that the second tower and other improvements were not  
3 authorized, and WRS's actions constituted trespass. See *United*  
4 *States v. Western Radio Services Co.*, No. 03:11-cv-00638-SI (the  
5 "civil case").

6 On May 23, 2012, the Government filed a motion for partial  
7 summary judgment in the civil case, on its claim of trespass. Dkt.  
8 #94 in the civil case. On June 29, 2012, the Government filed a  
9 second motion for partial summary judgment, this one on its claim  
10 for breach of contract. Dkt. #108 in the civil case. On  
11 August 29, 2012, Judge Michael Simon issued an Opinion and Order in  
12 the civil case, granting both of the Government's motions for  
13 summary judgment on the issue of liability, and also granting the  
14 Government's oral motion, made at oral argument, to dismiss its  
15 claim of negligence *per se*. Dkt. #148 in the civil case. Among  
16 other things, Judge Simon found WRS had "breached two provisions of  
17 the parties' lease by not obtaining formal authorization for the  
18 new construction and by not submitting detailed construction plans  
19 before starting construction." *Id.*, p. 5; see *id.*, pp. 5-10. On  
20 the trespass issue, Judge Simon found WRS's failure to obtain  
21 formal authorization before proceeding to build the second tower  
22 and make other modifications to the Walker Mountain site "exceeded  
23 the Forest Service's consent to use of the land and constitute[d]  
24 trespass." *Id.*, p. 11.

25 The present criminal action relates to Oberdorfer's activities  
26 on the Walker Mountain site for the time period from August 28  
27 through September 8, 2012. The Government claims that four days  
28 after attending oral argument on its motions for summary judgment

1 in the civil case, "Oberdorfer personally continued construction  
2 and placed communications equipment on the unauthorized tower" on  
3 Walker Mountain. Dkt. #19, p. 3. The Government further claims  
4 that "[d]ays after entry of summary judgment for the United States  
5 on both trespass and breach of lease [in the civil case], defendant  
6 Oberdorfer placed more communications equipment on the unauthorized  
7 tower." *Id.*, pp. 3-4. The Government asserts, "It is this  
8 activity that is the subject of this prosecution." *Id.*, p. 4.

9 The issue of appropriate remedies is still outstanding in the  
10 civil case. The Government has asked Judge Simon to award costs  
11 under the lease agreement in the amount of \$22,214.64, representing  
12 "personnel time and costs, plus additional time and costs addres-  
13 sing other proposed projects complicated by Western Radio's  
14 actions." Dkt. #207 in the civil case, p. 5. In addition, the  
15 Government has asked Judge Simon to require WRS to post a \$65,000  
16 bond to ensure removal of the tower. See Dkt. #30, p. 6 & n.2;  
17 Dkt. #32, p. 8.

18 The crux of Oberdorfer's motion to dismiss is his contention  
19 that the monetary damages sought by the Government in the civil  
20 case are not simply "damages"; they are, in fact, "punitive in  
21 purpose and result," intended to "punish Mr. Oberdorfer." Dkt.  
22 #30, pp. 5, 6. Oberdorfer claims he and WRS are virtually the  
23 same, noting he is the sole owner of WRS's assets, and, "[a]s one  
24 and the same, they are the very definition of privity." Dkt. #33,  
25 p. 6. At oral argument, Oberdorfer argued his actions underlying  
26 the Information are part of one continuous stream of events which  
27 is already the subject of the civil case. He theorizes that  
28 because the civil case is punitive in purpose and effect, it

1 therefore is criminal in nature, barring separate prosecution for  
2 the same conduct. See Dkt. #30, pp. 4-5. He further argues, at  
3 some length, that the Government cannot show it has suffered any  
4 actual harm from erection of the new communications tower, which  
5 Oberdorfer claims he erected "to prevent the collapse of his  
6 previous tower, similar in make, model, and construction to [a  
7 different] Forest Service tower that had recently collapsed under  
8 the weight of whether [sic] and ice." *Id.*, p. 4. He reasons that  
9 because the Government cannot show any actual harm it has suffered,  
10 the actual purpose of the civil case must be to punish him, rather  
11 than to obtain an actual remedial outcome. Oberdorfer maintains  
12 that removal of the new communications tower would be prohibitively  
13 expensive as well as hazardous. He claims the statutory scheme is  
14 "'so punitive either in purpose or effect as to transform what was  
15 clearly intended as a civil remedy into a criminal penalty.'" *Id.*  
16 (quoting *United States v. Reveles*, 660 F.3d 1138, 1140 (9th Cir.  
17 2011), in turn quoting *Hudson v. United States*, 522 U.S. 93, 99,  
18 118 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997)).

19 Oberdorfer's novel argument is not supported by the law or the  
20 facts. We begin with the purpose of the Fifth Amendment's prohibi-  
21 tion against double jeopardy, which "'protects against being  
22 punished twice for a single criminal offense.'" *United States v.*  
23 *Brooks*, 610 F.3d 1186, 1194 (9th Cir. 2010) (quoting *United States*  
24 *v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008)). In the case  
25 where "the same act constitutes a violation of two different  
26 statutes, the test to determine whether punishment for both  
27 offenses may be imposed is whether each provision requires proof of  
28 a fact which the other does not. . . . The elements of the

1 offenses are determinative, even if there is a substantial overlap  
2 in their proof.” *Id.* (internal quotation marks, citations  
3 omitted). The courts distinguish “between an act continuous in its  
4 character” - as Oberdorfer urges here - “and a case where the  
5 statute is aimed at an offense that can be committed [all at  
6 once].” *Blockburger v. United States*, 284 U.S. 299, 302, 52 S. Ct.  
7 180, 181, 76 L. Ed. 306 (1932) (internal quotation marks, citation  
8 omitted); *see Brooks, supra*.

9       Notably, “the Double Jeopardy Clause does not prohibit the  
10 imposition of all . . . sanctions that could, in common parlance,  
11 be described as punishment. . . . The Clause protects only against  
12 the imposition of multiple *criminal* punishments for the same  
13 offense, . . . and then only when such occurs in successive  
14 proceedings.” *Hudson v. United States*, 522 U.S. 93, 98-99, 118  
15 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997) (internal quotation  
16 marks, citations omitted; emphasis in original). Oberdorfer’s  
17 reliance on *Hudson* in this case is misplaced. The civil case does  
18 not involve any “civil penalty” of the type analyzed by the *Hudson*  
19 court; indeed, these two cases do not involve two separate criminal  
20 punishments at all. The civil case involves a garden-variety  
21 contract claim for WRS’s breach of its lease agreement, and a claim  
22 against WRS for the common-law tort of trespass. The civil case  
23 arose from WRS’s actions that took place in 2010. In contrast, the  
24 present criminal action is based on Oberdorfer’s actions in August  
25 and September of 2012 - actions that had not even taken place at  
26 the time the Government filed the civil case against WRS. The two  
27 cases involve distinctly different facts and law.

1 It is true that in some cases, the Government may act  
2 improperly in conducting parallel civil and criminal investiga-  
3 tions. "[T]he government may act in bad faith if it brings a civil  
4 action solely for the purpose of obtaining evidence in a criminal  
5 prosecution and does not advise the defendant of the planned use of  
6 evidence in a criminal proceeding." *United States v. Stringer*, 535  
7 F.3d 929, 936-37 (9th Cir. 2008) (citing *United States v. Kordel*,  
8 397 U.S. 1, 11, 12-13, 90 S. Ct. 763, 767-70, 25 L. Ed. 2d 1  
9 (1970)). However, there is no indication here that the Government  
10 conducted its investigation of WRS's 2010 construction of the  
11 communications tower for the purpose of later filing a criminal  
12 action against Oberdorfer. To belabor the point, Oberdorfer's  
13 allegedly criminal acts had not even taken place at the time the  
14 Government's dispute with WRS arose. Indeed, the Government notes  
15 Oberdorfer's actions that form the basis of the criminal case  
16 "occurred after 20 plus months of no construction activity and  
17 completion of discovery and filing of dispositive motions in the  
18 civil action." Dkt. #32, p. 6.

19 Oberdorfer also attempts to draw a distinction between the  
20 Government's claims in the civil case and typical trespass cases.  
21 At oral argument, Oberdorfer argued that in a typical trespass  
22 case, the trespasser has no right to be on the land at all. In  
23 contrast, here, Oberdorfer has had a right to be on the property in  
24 question for over thirty years. He claims the only real dispute is  
25 whether he followed the proper procedures before erecting the new  
26 communications tower. He asserts that all he has done is improve  
27 the way his business operates by preventing a weaker tower from  
28 falling under the weight of the weather. Notably, Judge Simon

1 rejected this argument in ruling on the Government's summary  
2 judgment motions in the civil case. He held WRS's "failure to  
3 obtain advance approval for its construction [was] not a mere  
4 technical mistake." Dkt. #148 in the civil case, p. 12.

5 Oberdorfer continues to argue that what the Government is  
6 proposing in the civil case is punitive and not remedial. At oral  
7 argument, he advanced the argument that if, in the civil case,  
8 Judge Simon orders him to remove the first, inferior tower, that  
9 would constitute a "remedy," whereas if he is ordered to take down  
10 the new, superior tower, that would be a "punishment." None of the  
11 authorities Oberdorfer cites supports such an illogical conclusion.

12 Simply stated, Oberdorfer's argument, though creative, is  
13 unpersuasive. As Justice Stevens noted in his concurrence in the  
14 *Hudson* judgment, "it would be difficult to find a case raising a  
15 double jeopardy claim that would be any easier to decide than this  
16 one." *Hudson*, 522 U.S. at 108, 118 S. Ct. at 497 (Stevens, J,  
17 concurring). From the straightforward application of well-  
18 established double jeopardy principles to the facts of this case,  
19 it is clear that the criminal prosecution of Oberdorfer for the  
20 actions charged in the Information does not violate the Double  
21 Jeopardy Clause.

22 Oberdorfer also advances arguments based on collateral  
23 estoppel, *res judicata*, and privity. None of those arguments is  
24 even remotely persuasive, and I find it unnecessary to discuss  
25 their merits here. While Oberdorfer is clearly in privity with  
26 WRS, there is nothing else contained in Oberdorfer's collateral  
27 estoppel or *res judicata* discussion which supports dismissal of the  
28 Information.

1 In conclusion, Oberdorfer's motion to dismiss the Information  
2 on double jeopardy grounds is **denied**.

3 IT IS SO ORDERED.

4 Dated this 24th day of April, 2013.

5 /s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge